Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1979

No. 79-991

ROBBIN HOWARD,

Petitioner,

vs.

DES MOINES REGISTER & TRIBUNE COMPANY, DR. ROY C. SLOAN and MARGARET ENGEL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

OSCAR E. JONES
1205 E. 33rd Street
Des Moines, Iowa 50317
Attorney for Petitioner

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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DES MOINES REGISTER & TRIBUNE COMPANY, DR. ROY C. SLOAN and MARGARET ENGEL,

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—o—

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

—o—

The petitioner, Robbin Howard, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Iowa entered in this proceeding on September 19, 1979.

—o—

OPINION BELOW

The opinion of the Supreme Court of Iowa has been published at 282 N. W. 2d 289 (1979) and appears as Appendix C.

—o—

JURISDICTION

On the 19th day of September, 1979, the Supreme Court of Iowa filed its Opinion and Judgment (see Appendix C). Petitioner filed no motion for a rehearing of this matter by the Supreme Court of Iowa and has neither requested nor received an order granting an extension of time within which to file a petition for certiorari. The jurisdiction of this court is invoked under Title 28 U. S. C. § 1257 (3).

—o—

QUESTIONS PRESENTED

1. Whether the First Amendment to the United States Constitution required summary judgment in this case.

2. Whether the First Amendment to the United States Constitution provided immunity in this case.

3. Whether the fact that part of the information in the article was not obtained from public records destroyed respondents' immunity, if any existed.

4. Whether the time lapse between the happening of the event and the publication of the article was material

in determining whether or not petitioner's name was "newsworthy".

—o—

CONSTITUTIONAL PROVISION

First Amendment to the United States Constitution.

—o—

STATEMENT OF THE CASE

Petitioner was formerly known as Robin Woody; in 1970 while a minor, petitioner was confined in the Jasper County Home; while in the Jasper County Home, petitioner was sterilized against her wishes; after her release from the Home, petitioner led a quiet and respectable life; on February 15, 1976, defendant, Des Moines Register & Tribune Company, published an article in the Des Moines Sunday Register under the heading, "Scalding Deaths at Jasper County Home Revealed", under the respondent, Margaret Engel's, byline.

The part of the article about which petitioner complains is contained in said article and was as follows:

> "The Register also learned that an 18 year old woman sterilized in 1970 was not retarded or mentally disabled, but an 'impulsive hair-triggered young girl' in the words of Dr. Roy C. Sloan, the home's psychiatrist."
>
> "The decision to sterilize the resident, Robin Woody, was made by her parents and himself. He does not

recall whether Woody agreed to the operation, but a woman who was a nurse at the home at the time said, 'She didn't want it at all'."

"The State Board of Eugenics reports six sterilizations —all of women—were approved under the Jasper Home in the last five years."

—o—

REASONS FOR GRANTING THE WRIT

I. In this case the Iowa Supreme Court has decided a federal question of substance: that defendants, Des Moines Register and Tribune Company and Margaret Engel are protected by the First Amendment to the United States Constitution in an action for invasion of privacy.

II. That this case presents a serious question as to the fundamental rights of individuals not to have their private lives invaded when the public has no valid interest or concern with the individual.

A review of the decisions of the Supreme Court of the United States indicates that the question presented in this Petition for Writ of Certiorari have yet to be decided. No specific Supreme Court case law precedent regarding the applicability of the First Amendment to the U. S. Constitution under a factual situation such as presented by this case.

State courts and various federal courts have considered the immunity provided to newspapers and reporters in granting and publishing news articles. It has been established that the immunity granted by the First Amendment to the U. S. Constitution is not absolute.

Similar situations were presented to courts in *Virgil v. Times, Inc.,* 527 F. 2d 1122 (1975); *Cox Broadcasting Corp. v. Cohn,* 420 U. S. 469, 95 Sup. Ct. 1029, 43 L. Ed. 2d 328 (1975); *Afro-American Publishing Co. v. Joffe,* 366 F. 2d 649 (1966); and *Cason v. Baskin, et al.,* 20 So. 2d 243 (1945).

In the *Virgil* case, the court held that the public's right to know is subject to reasonable limitations so far as concerns the private facts of its individual members. If the public has no right to know can it yet be said that the press has a constitutional right to inquire and inform. We conclude that unless it is privileged as newsworthy, the publicizing of private facts is not protected by the First Amendment. Summary judgment is proper only if reasonable minds could not differ. The courts have consistently held that the right of privacy against the publication of one's private affairs with which the public has no legitimate concern or the wrongful intrusion into one's private activities in such manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities is actionable, that a person will be held liable who publishes material with knowledge that it would be offensive to persons of ordinary sensibilities. The facts published about petitioner in the case at bar are facts which could certainly be found to cause mental suffering, shame and humiliation and would be offensive to persons of ordinary sensibilities. The article complained of informed the public that there had been six illegal sterilizations at the Jasper County Home. Although the article was "newsworthy", the petitioner's name was not. The

printing of petitioner's name was a morbid and sensational prying into petitioner's private life of which the public had no concern. Her name added nothing to the article and the article would have been just as effective without the printing of petitioner's name. As the court stated in the *Virgil* case, the general subject matter of most publications is of public interest but the fact that individuals engage in an activity, which the public has a general interest, does not render every aspect of their lives subject to public disclosure.

The trial court erred in granting summary judgment in favor of respondents and the Iowa Supreme Court erred in affirming the trial court's ruling because under the facts of this case, a jury question was generated because reasonable minds could have differed and petitioner should have had the right to prove that the information gathered by respondents were not gathered exclusively from "public records" and was not, therefore, protected by the First Amendment to the U. S. Constitution.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Iowa.

Respectfully submitted,

Oscar E. Jones

1205 E. 33rd Street
Des Moines, Iowa 50317

Attorney for Petitioner

APPENDIX A

IN THE DISTRICT COURT OF THE STATE OF IOWA IN AND FOR POLK COUNTY

Law No. .....

ROBBIN HOWARD,

Plaintiff,

vs.

THE DES MOINES REGISTER & TRIBUNE COMPANY, DR. ROY C. SLOAN and MARGARET ENGEL,

Defendants.

PETITION AT LAW

DIVISION I

Plaintiff, for her cause of action against defendant, Dr. Roy C. Sloan, states:

1. That plaintiff is an individual and resides in Des Moines, Polk County, Iowa, and was formerly known as Robin Woody.

2. That defendant, Dr. Roy C. Sloan, is a licensed physician in Newton, Jasper County, Iowa, and at the times material hereto was employed by the Jasper County Home.

3. That in 1970 plaintiff, who was then a minor and known as Robin Woody, was confined to the Jasper County Home and while so confined, plaintiff was sterilized against her wishes.

4. That plaintiff has at all times since being released from the Jasper County Home, lived a quiet and honor-

able life, assumed a respectable role in society, and made several friends and acquaintances who were not aware of plaintiff's operation.

5. That in late 1975 or early 1976, defendant, Dr. Roy C. Sloan, without plaintiff's prior knowledge or consent, told defendant, Margaret Engel, of plaintiff's operation, knowing that defendant, Margaret Engel, was a newspaper reporter and that the said defendant, Margaret Engel, would publish such information. As a result thereof, plaintiff has been subjected to contempt, ridicule and inquisitive notice of the general public; that plaintiff's peace of mind has been disturbed; that plaintiff has been greatly humiliated; and as a result of the willful conduct of defendant, Dr. Roy C. Sloan, plaintiff has suffered great mental pain and anguish and will continue to suffer permanently in the future.

6. That the willful, unlawful and unauthorized disclosure was an invasion of plaintiff's privacy, and was in violation of the Hippocratic Oath.

WHEREFORE, plaintiff demands judgment against defendant, Dr. Roy C. Sloan, for actual and punitive damages in the sum of Five Hundred Thousand Dollars ($500,000.00) and for exemplary damages in the sum of Five Hundred Thousand Dollars ($500,000.00) with interest as provided by law and the costs of this action.

DIVISION II

Plaintiff, for her cause of action against defendant, Margaret Engel, states:

1. That plaintiff is an individual and resides in Des Moines, Polk County, Iowa, and was formerly known as Robin Woody.

2. That defendant, Margaret Engel, is an individual and is employed as a reporter by defendant, The Des Moines Register & Tribune Company.

3. That on February 15, 1976, defendant, Margaret Engel, as an upstaged reporter for The Des Moines Register & Tribune Company, caused to be published, without the knowledge or consent of plaintiff, an article in The Des Moines Sunday Register, which article revealed that plaintiff had been sterilized in 1970 while plaintiff was confined to the Jasper County Home.

4. That plaintiff is a person of quiet temperament who has, at all times since being released from the Jasper County Home, lived a quiet and private life, avoiding notoriety and the prying curiosity of the public, seeking at all times to demean herself with quiet dignity, and has at all times sought to preserve the dignified respect of her friends, companions, associates, neighbors, and all social relationships; that said article was prepared by defendants, The Des Moines Register & Tribune Company, Dr. Roy C. Sloan and Margaret Engel, maliciously, with contempt, and with utter disregard for plaintiff's feelings, without plaintiff's prior knowledge or consent and was published and circulated, or caused to be circulated, throughout the State of Iowa and other states; that The Des Moines Sunday Register has a circulation of approximately 500,000. A copy of said article is attached hereto, marked Exhibit "A", and made a part hereof.

5. That said article was written maliciously, with contempt and utter disregard of plaintiff's feelings, and invaded the seclusion of plaintiff's private life and exploited an event in her past which defendants, Margaret Engel, Dr. Roy C. Sloan and The Des Moines Register & Tribune Company, knew, or should have known, that plaintiff did not want the matter contained in said article to be exposed to the general public.

6. On confirmation and belief, plaintiff alleges that a great number of her friends, neighbors, acquaintances, and numerous other persons unknown to plaintiff read said article depicting plaintiff in an embarrassing and degrading manner.

7. That as a direct and proximate result of the willful and unlawful publication and circulation of said article, plaintiff was subjected to public contempt and ridicule, the inquisitive notice of the general public which was utterly obnoxious to plaintiff, loss of dignity and self-respect and plaintiff suffered loss of sleep and severe mental pain and anguish, bordering on a nervous breakdown.

8. That the writing of said article was done maliciously and with utter contempt toward the private life of plaintiff and that said article did injure and aggrieve plaintiff by thrusting on her unsought, unwarranted and undesired publicity and notoriety and caused plaintiff untold humiliation therefrom.

WHEREFORE, plaintiff demands judgment against defendant, Margaret Engel, in the sum of Five Hundred Thousand Dollars ($500,000.00) actual and punitive damages and Five Hundred Thousand Dollars ($500,000.00)

exemplary damages, with interest as provided by law and the costs of this action.

DIVISION III

Plaintiff, for her cause of action against defendant, The Des Moines Register & Tribune Company, states:

1. That plaintiff is an individual and resides in Des Moines, Polk County, Iowa, and was formerly known as Robin Woody.

2. That at all times involved herein, defendant, The Des Moines Register & Tribune Company, was a corporation organized and existing under and by virtue of the laws of the State of Iowa with its principal place of business in Des Moines, Polk County, Iowa, and was the owner and publisher of a newspaper known as The Des Moines Register, which was and is published daily in Polk County, Iowa.

3. That at all times mentioned herein, the said newspaper had a wide circulation in the State of Iowa and other states and has a daily circulation of approximately 500,000.

4. That plaintiff is a person of quiet temperament who has at all times since being released from the Jasper County Home, lived a quiet and private life, avoiding notoriety and the prying curiosity of the public, seeking at all times to demean herself with quiet dignity and has at all times sought to preserve the dignified respect of her friends, companions, associates, and neighbors in all social relationships.

5. That on February 15, 1976, defendant, The Des Moines Register & Tribune Company, through its duly

authorized agents and representatives, without plaintiff's prior knowledge or consent, and with utter contempt toward plaintiff and her right to privacy, published and circulated approximately 500,000 copies of The Des Moines Sunday Register containing an article entitled "Scalding Deaths at Jasper Home Revealed", which article also contained information that plaintiff was sterilized at the Jasper County Home in 1970. A copy of said article is attached hereto, marked Exhibit "A", and made a part hereof.

6. That such publication and circulation was willful, unlawful, and unauthorized and was done by defendant without plaintiff's knowledge or consent, and with contempt toward plaintiff and her right to privacy.

7. That defendants, The Des Moines Register & Tribune Company, Dr. Roy C. Sloan and Margaret Engel, knew, or should have known, that plaintiff did not want the matter contained in said article to be exposed to the general public.

8. On information and belief, plaintiff alleges that the publication and circulation of said article brought defendant, The Des Moines Register & Tribune Company, great pecuniary profit and gain.

9. Plaintiff alleges that a great number of her friends, neighbors, acquaintances, associates, and numerous other persons unknown to plaintiff, read said article depicting the plaintiff in an embarrassing and degrading manner.

10. That as a direct and proximate result of the willful, unlawful and unauthorized publication and circulation of said article, the plaintiff was subjected to public con-

tempt and ridicule, the inquisitive notice of the general public which was utterly obnoxious to plaintiff, loss of dignity and self-respect, and plaintiff suffered loss of sleep and severe mental pain and anguish, bordering on a nervous breakdown.

11. That defendant, The Des Moines Register & Tribune Company, by its duly authorized agents and representatives, maliciously intended to injure and aggrieve plaintiff by thrusting on her unsought, unwarranted and undesired publicity, notoriety, and untold humiliation.

12. That the willful, unlawful and unauthorized publication of said article was an invasion of plaintiff's privacy.

WHEREFORE, plaintiff prays for judgment against defendant, The Des Moines Register & Tribune Company, in the sum of Five Hundred Thousand Dollars ($500,000.00) actual and punitive damages and Five Hundred Thousand Dollars ($500,000.00) exemplary damages, plus interest as provided by law and the cost of this action.

/s/ Oscar E. Jones

Attorney for Plaintiff

1205 East 33rd Street
Des Moines, Iowa 50317
Telephone: 265-3489

SCALDING DEATHS AT JASPER HOME REVEALED

by Margaret Engel

Register Staff Writer

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NEWTON, IA.—The Jasper County Home, under fire from the state Health Department for poor care and lax administration, has a history marred by deaths from scalding baths, sterilizations of women who are not mentally disabled, and shipments of prescription drugs that apparently were illegal.

The administrator of the home for 22 years, Riva Ripper, quit in the wake of a Jan. 30 notice from the Health Department that the home's custodial and nursing licenses will be revoked. The revocation notices accused the home of a long list of health, safety and management violations.

The home's nursing director, Ruth Broderson, also resigned. Ripper's husband, Clarence, who ran the adjoining county farm, died of a heart attack Feb. 1.

Health officials say the home has had continual problems over the years. In checking county records, The Register has learned that two of the home's residents died as a result of scalding baths.

A grand jury investigation was held in 1969 in the death of Sheryl Anthony, 18, who died that May of thermal burns. No indictments were returned and the grand jury's minutes remain secret.

On Sept. 9, 1974, there was a second death from burns at the home.

Richard Shivers, 63, died 13 days after suffering second- and third-degree burns on his back. His aunt, Kathryn Gustafson of Newton, says Shivers told her before he died that he was bathing himself and mistakenly turned on the wrong faucet.

Shivers, who was classed as a chronic schizophrenic, probably got "over nervous and slipped in the tub and could not get out," she said, adding she does not believe anyone was negligent.

Dr. John Ferguson, who visits weekly at the home, said Shivers was able to bathe himself and that he was "momentarily left" by an aide when the accident occurred.

The state Health Department did not know of the deaths until recently, despite a rule requiring nursing homes to submit reports on such accidents. John Wild, director of the department's licensing section, said few reports ever have been filed by the Jasper home.

The Register also learned that an 18-year-old woman sterilized in 1970 was not retarded or mentally disabled, but an "impulsive, hair-triggered young girl," in the words of Dr. Roy C. Sloan, the home's psychiatrist.

He said the decision to sterilize the resident, Robin Woody, was made by her parents and himself. He does not recall whether Woody agreed to the operation, but a woman who was a nurse at the home at the time said "she didn't want it at all."

Forced Sterilization

"For two to three weeks when I came to work she was crying," said Collene Blakely of Newton. "She was told the only way she could be dismissed from the home is if she would agree to be sterilized."

Dr. Sloan denied that, saying, "We don't think in terms of punishment. That child—she was a young girl—was a very explosive, impulsive young girl largely without controls over her aggressive and, at times, irrational behavior."

He said she was sterilized because "she would be a very questionable risk as far as having and

rearing a baby. The people who hold on that way are those who move on to child abuse."

Robin's mother, Mrs. Gladys Woody of Newton, said she agreed with the decision then and now. She would not discuss the matter further.

Woody was discharged from the home Dec. 29, 1971, and Mrs. Woody does not know where she is living.

6 Sterilizations

The State Board of Eugenics reports six sterilizations—all of women—were approved from the Jasper home in the last five years.

Officers of the board, who are trying to get it abolished by the Legislature, say they do not enforce a 1936 state law allowing sterilizations for persons believed likely to bear a child having "an inherited tendency to mental retardedness, syphilis (sic), mental illness, epilepsy, criminality, or degeneracy or who would probably become a social menace or ward of the state."

"We never approved a sterilization for anybody who was unruly or a discipline problem," said Theresa Weiser, executive secretary of the board. "They had to be severely mentally retarded."

The board approved 176 sterilizations in the last five years; 39 were denied.

Although it is not required that sterilization cases go before the board. Dr. Sloan said the home began sending its requests there in 1972.

"There was a great deal of concern and local criticism emanating from certain people that perhaps there might not have been a need for sterilizations, that there were some shenanigans going on," he said.

Dr. Sloan said he decides whether to recommend the surgery on the basis of "whether that person is

capable of being able to become a parent and be responsible for a child."

Chronically Ill

"One of the very sound reasons (for surgery) is for a chronically and severely ill person whose behavior is such that it impairs their judgment so that sex and pregnancy would be considered a desirable thing to accomplish," he added.

He said he cannot recall how many residents were sterilized in his eight years at the home, but that all were women and "a number" weren't retarded. He noted that "probably three or four of the individuals did sign a statement" consenting to the operation. The women's guardians always approved the surgery, he said.

Apparent irregularities involving drugs brought the facility to the attention of another state agency. The home, and the drug firms supplying it, apparently were in violation of policies of the Iowa Board of Pharmacy Examiners for years before the home was granted its first pharmacy license in February, 1973.

Before that time, the late George Weirick, Sr., a pharmacist registered at his Colfax drugstore, would travel to the home one afternoon a week, working with the drugs that had been delivered there. Board rules say prescription drugs cannot be sent to an address other than the one at which a pharmacist is licensed.

The only exception is if a doctor registers with the state to be responsible to receive and lock up any drugs. No doctor was so registered at the Jasper home.

Paul Crews, executive secretary of the pharmacy board, said when a complaint about this situation was filed in 1972, the board insisted a license be obtained.

"We could have filed a criminal charge, but they were purchasing it (prescription drugs) out of ignorance," he says. "You do have to be reasonable in these matters."

Weirick's son, George, who is the home's current pharmacist, said this rule was never explained by the examiners and drugs usually were delivered to the nurse in charge, who would lock them up.

Crews said although the home can be excused, the companies shipping the drugs should have known it was illegal. Action was not taken against the firms, Crews said, because they were from outside Iowa and the board has no power over them.

When informed one of the home's major suppliers was the J. W. Edgerly Co. of Ottumwa, Crews said, "Following our established procedures, I know they were admonished."

Knew Nothing

Jay Anderson, president since 1974 of the Ottumwa firm, knew nothing about any admonition or where the drugs were sent. He said no invoices listing addresses were kept, but said it was thought a pharmacist was at the home when the drugs were received.

Drugs also were dispensed haphazardly, a former pharmacist at the home charges. Martin Ogden, 41, said he was asked by the younger Weirick, his former drugstore partner, to work at the home in May, 1973.

Ogden said keys to the nurse's medication room often were left in the open. He said he first became alarmed when he saw an employe who was a former patient attempting to prepare medicine trays while "in a state of intoxication either by alcohol or drugs."

"There was a very definite oversupply of medication and I was frightened for my license when I saw the very slipshod drug procedures there," Ogden said.

"A patient, an obviously insane man, reached into his pockets and pulled out two fistfuls of drugs on another occasion."

Charges of overmedication were echoed by former nurse Blakely and activities director Vivian DeGreef, 50. Registered nurse Colleen Haft, who has worked at the home for 14 years, said most of the residents get medicine two or three times daily.

Defends Practices

Dr. Sloan defended the home's drug use. "My judgment has to prevail and I would question what people say who probably don't have a qualified opinion," he said.

Ogden said his problems at the home contributed to the end of his partnership. Ogden's work at the home was terminated by former county supervisor Carroll Eichner after he set a coat-hanger booby trap to discover if anyone entered the pharmacy in his absence.

Ogden asked for a pharmacy examiner's audit when he left Dec. 7, 1973. In the report given to the Board of Supervisors, the pharmacy examiner said no significant quantity of drugs was unaccounted for. The report did insist the pharmacist hold the only key to the drug room, one of Ogden's complaints. Dr. Ferguson said Ripper and the Board of Supervisors then gave up their keys.

A rapid staff turnover adds to the home's problems, said DeGreef, who left her job as activities director Jan. 5. She estimated 30 to 35 employes have left the home in the last six months. Supervisor Wayne Taylor has said an employe was fired recently for being drunk and another for charging personal items to the county.

Other complaints were aired at a public meeting that filled the county courtroom Feb. 7. Although Taylor said he and supervisor Francis Van Zante called the meeting with the intention of immediately closing it to interview an applicant for administrator, public pressure reopened the meeting after 70 minutes.

Several citizens chastized the two men for ignoring the third supervisor, Jeanne Bridenstine. Van Zante admitted he and Taylor had met three times at the home without Bridenstine.

Other complaints raised during the meeting include:

- A charge by Charles Gifford of Newton, a former county Democratic chairman, that 39 absentee ballots were filled out in the 1964 election for residents of the home who were incapable of voting, including his brother, Dale. The ballots were thrown away when contested, Gifford said.
- A November, 1973, accident in which two residents of the home burned to death when a truck rammed into the home's station wagon as it was traveling slowly on the interstate.

Police said Clarence Ripper had taken three residents and an employe to round up cattle owned by Jack Wormley, a former state senator, that had strayed onto Interstate 80.

The home's car was struck from the rear, exploding its gas tank. The third resident was burned severely, had fingers amputated and spent seven months in University Hospitals at Iowa City recovering.

Taylor defends the home as one of the best in Iowa and credits it with serving people other homes reject. In recent months the facility has temporarily housed 2-, 3- and 5-year-olds waiting for transfer to foster homes, a 42-year-old woman serving a jail sentence there and many teen-aged runaways.

Some 76 of the home's 144 residents are mental patients. Wild, of the health department, said these residents should be moved to the Mount Pleasant mental institution, where they could be better served.

A hearing on whether to revoke the home's state custodial and nursing home licenses will be held before Mar. 27. The Jasper County attorney has appealed the state department's action and is awaiting specific charges behind the list of violations alleged in the Jan. 30 revocation notice.

APPENDIX B

Exhibit "A"

IN THE DISTRICT COURT OF THE STATE OF IOWA IN AND FOR POLK COUNTY

No. CL 15-8462

ROBBIN HOWARD,

Plaintiff,

vs.

DES MOINES REGISTER & TRIBUNE COMPANY, DR. ROY C. SLOAN, AND MARGARET ENGLE,

Defendants.

RULING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Motion for Summary Judgment was filed herein on the 21st day of April, 1978, in behalf of Defendants Des Moines Register & Tribune and co-Defendant and reporter, Margaret Engle. Plaintiff filed Resistance to said Motion on the 2nd day of May, 1978. Said Defendants also filed Supporting Statement and Memorandum, Affidavits, Depositions, and a substantial Memorandum Brief of authorities in support of their respective positions.

In her Resistance, Plaintiff states that the information concerning her sterilization "was not obtained completely from public records", "was not news worthy and privileged", and "was not voluntarily and widely disclosed and waived by the Plaintiff". Plaintiff also filed her own Affidavit in support of her Resistance to Motion for Summary Judgment indicating in part that she did not disclose matters concerning her sterilization and that she

was not contacted prior to the contested publication of an article concerning her sterilization.

The Court would state in summary that it appears that both the moving Defendants and the Plaintiff have substantially complied with the requirements of Iowa Rule of Civil Procedure 237 with its requirements of supporting memorandum and statements, affidavits, etc.

The Court considers that some minimal factual statement is necessary for adequate understanding and basis for its ruling herein. It appears to be relatively uncontroverted that on or about the 15th day of February, 1976, an article was printed in the Des Moines Sunday Register and that said article contained in part the following language and statement which had specific reference to the Plaintiff herein:

"The Register also learned that an 18 year old woman sterilized in 1970 was not retarded or mentally disabled, but an 'impulsive, hair-triggered, young girl' in the words of Doctor Roy C. Sloan, the Home's psychiatrist.

"He said the decision to sterilize the resident Robin Woody was made by her parents and himself. He does not recall whether Woody agreed to the operation, but a woman who was a nurse at the home at the time said 'she didn't want it at all'.

"'For two to three weeks when I came to work, she was crying' said Collene Blakely of Newton. 'She was told the only way she could be dismissed from the home is if she would agree to be sterilized'.

"Doctor Sloan denied that, saying 'We don't think in terms of punishment. That child—she was a young girl—was a very explosive, impulsive young girl largely without controls over her aggressive and at times irrational behavior.'

"He said she was sterilized because 'she would be a very questionable risk as far as having and rearing a baby. The people who hold on that way are those who move on to child abuse.'

"Robbin's mother, Mrs. Gladys Woody, of Newton said she agreed with the decision, then and now. She would not discuss the matter further.

"Woody was discharged from the Home December 29, 1971, and Mrs. Woody does not know where she is living."

The Court notes that the above quoted matters were contained in and part of a substantially longer article which contained numerous references to other alleged illegal activities at the Jasper County Home which at that time was under investigation. The Court also notes that the headline pertaining to this particular article when it first appeared on Page 1 of the aforementioned publication read as follows: "SCALDING DEATHS AT JASPER HOME REVEALED", and further that the corresponding headline that appeared on Page 8A where the story was continued had the following statement: "RAPID STAFF TURNOVER ADDS TO PROBLEMS". The Court also notes that all of the above quoted portions of the article involved which had specific reference to the Plaintiff herein appeared on the continuing page of the article and she was not specifically referred to on the portion of the article that appeared on the beginning and first page of the publication. The only reference in the first part of the published article to anything concerning this Plaintiff was

a statement in the first paragraph that indicated as follows: "The Jasper County Home, under fire from the State Health Department for poor care and lax administration, has a history marred by deaths from scalding baths, *sterilizations of women who are not mentally disabled,* and shipments of prescription drugs that apparently were illegal." (Emphasis applied.) In this Court's opinion, it is important that it be noted how this subject matter was treated in the indicated publication—it is important to note that the fact of sterilizations and the fact of specific sterilization of this Plaintiff was not mentioned in any way in either one of the indicated headlines, and it is also important to note as indicated above, that the specific identification of this Plaintiff as being involuntarily sterilized all appears on the continuation of this article. The Court takes judicial notice of the fact that any student of journalism would understand and accept the proposition that a substantial number of readers are lost when a story is continued to a succeeding page, i. e., that reader interest is diminished when it is necessary to manually turn pages to read the continuation or summation of a news article.

To place this Motion for Summary Judgment in proper perspective, the Court also feels it is necessary to state that the petition filed herein is in three Divisions. Division I is against Doctor Roy C. Sloan, and is based on his willful, unlawful, and unauthorized disclosure of information concerning the Plaintiff, i. e., the fact of her involuntary sterilization, etc. Division II is against the Defendant Margaret Engle who is properly identified as a reporter for the Defendant Des Moines Register & Tribune Company, and the cause of action against her is based on

the fact that she "maliciously with contempt and with utter disregard for Plaintiff's feelings, without Plaintiff's prior knowledge or consent" published and circulated or caused to be circulated the aforementioned article. The petition goes on to further aver that said actions invaded the seclusion of Plaintiff's private life and exploited an event in her past. Division III of the petition alleges a cause of action against the Defendant Des Moines Register & Tribune Company, and is couched in somewhat similar terms as was indicated regarding Division II, and the action against reporter Margaret Engle.

The Court considers that it is safe to say that the causes of action against the moving party herein, i. e., the Des Moines Register & Tribune Company and Margaret Engle might well be identified as being based upon invasion of privacy.

Perhaps at this point it would be necessary and proper for the Court to set forth some general principles of law which must be considered and might well be controlling concerning Motions for Summary Judgment.

The purpose of Summary Judgment is to enable a party with a just cause of action to obtain judgment promptly without unnecessary delay and expense of trial in cases where there is no substantial or relevant factual issue to try—See *Northwestern National Bank of Sioux City v. Steinbeck* (1970), 179 N. W. 2d 471; *Davis v. Comito* (1973), 204 N. W. 2d 607; and *Davis v. Travelers* (1972), 196 N. W. 2d 526.

If reasonable minds could draw different inferences and reach different conclusions from undisputed facts, is-

sue must be reserved for trial and Summary Judgment is improper—See *Daboll v. Hoden* (1974), 222 N. W. 2d 727.

On Motion for Summary Judgment, all matters properly before the Court are viewed in a light most favorable to the opposing party—See *Schulte v. Mauer* (1974), 219 N. W. 2d 496.

When any Court is confronted with a Summary Judgment Motion, it must examine the entire record before it, including pleadings, admissions, depositions, answers to interrogatories, and affidavits, if any, to determine for itself whether evidentiary facts are presented which, if decided in favor of Defendant, would amount to a good defense to action—See *Davis v. Comito,* supra; *Davis v. Travelers,* supra, and *Northwestern National Bank of Sioux City v. Steinbeck,* supra.

Without necessity of citation, this Court is also conscious of a present prevalent philosophy of the Iowa Supreme Court regarding Motions for Summary Judgment which is generally instructive to Trial Courts to the effect that causes of action are best tried to jurys and not decided by Judges. In its review of recent Iowa Supreme Court decisions, this Court is much more conscious of the numbers of times we Trial Courts are overruled for sustaining Motions for Summary Judgment than it is of those decisions where Trial Courts are affirmed for sustaining Motions for Summary Judgment.

Against this obvious philosophical background, Defendants here, however, urge upon this Court the fact that Motions for Summary Judgment involving fact situations, at least minimally comparable to this one, reflect a different attitude—reflect an attitude that if at all possible and

within reasonable constraints, a Motion for Summary Judgment should be sustained. This is true in the opinion of Defendants because to do otherwise, would have a chilling affect on dispensers of news, whatever form of media is involved, and is materially affected in Defendants' opinion by the protections afforded by the Free Press Clause of the U. S. Constitution and the Iowa Constitution.

In their substantial brief, Defendants have urged this Court to sustain the Motion for Summary Judgment on four separate and distinct grounds and they were set forth in the summary to Defendants' brief in support of Motion for Summary Judgment as follows:

1. The publication is protected by the Free Press Clause of the U. S. Constitution and the Iowa Constitution;

2. The publication was "newsworthy";

3. The news report was based on information taken from public records; and

4. The Plaintiff by her action *waived* any alleged expectations of privacy.

Considering first the fourth indicated ground, the Defendants urge that Plaintiff openly and freely discussed her sterilization with friends and casual acquaintances. The Court does not choose to decide this Motion on the basis of such ground primarily for the reason that there does not appear to be, as a matter of law, open and free discussion of her condition. She apparently discussed this with her mother, but as noted in the article involved, her mother was the one who agreed to this condition. She

discussed it with a boyfriend and with two acquaintances from Chicago, and one could find that it was not expected that these conversations and revelations were for public consumption, but were more of a confidential nature. She likewise revealed her condition to a nurse's aide, Collene Blakely, and this too could be considered of a confidential nature. This Court cannot accept Defendants' position that just any revelation of condition to any person is sufficient to support a finding as a matter of law that the Plaintiff had waived her right to privacy.

Ground Number 3 has to do with the fact that the news report was based on information taken from public records. In response to this particular ground, Plaintiff argues that some of the information utilized in the article and as background information for the article by Defendant reporter Engle was obtained from other than official public records—particularly that some information of importance was obtained from an interview with Defendant Doctor Sloan. Defendants counter that the information obtained from Doctor Sloan was only used to confirm and substantiate competent and complete information that was already available to Defendant Engle and was after she had substantially completed her research and compilation of information. In any event, again, this Court cannot find as a matter of law that the article was based to the extent that it considers necessary—to be an absolute defense to this cause of action—on information obtained from public records.

The second and in this Court's opinion the most compelling ground urged by Defendants in support of their Motion for Summary Judgment is that the publication was "newsworthy" and therefore was privileged. This

Court has reviewed the authorities provided by Defendants and has considered that portion of the Defendants' brief and argument having to do with "a truthful publication of newsworthy facts is Constitutionally privileged". The Court read with considerable interest and attention the case of *Bremmer v. Journal-Tribune Publishing Company* (1956), 76 N. W. 2d 762, 247 Iowa 817. In *Bremmer,* supra, the Iowa Supreme Court had its first opportunity to consider whether or not there was, in fact, a right of privacy tort that could be the basis for a cause of action in the State of Iowa and further, whether or not said right of action should be in any way limited or curtailed. In *Bremmer,* supra, the surviving parents of an eight-year-old boy sued Defendant paper for publishing a photograph which in part depicted the "mutiliated and decomposed body of Jimmy Bremmer". The boy has been missing for a month and the photograph depicted the place where his body was found.

The Defendant filed a Motion to Dismiss and this was sustained by the Trial Court and affirmed by the Iowa Supreme Court. The decision indicates that the Trial Court actually treated Defendant's Motion as one for Judgment on the Pleadings. In this six to three decision, the Iowa Supreme Court initially analyzed the national history of right of privacy actions. It was stated at Page 764: "The 'right of privacy' has been defined as a right of an individual to be let alone, to live a life of seclusion, to be free from unwarranted publicity (citation omitted) . . . violation of the right of privacy is a tort." It was further stated at Page 765:

"A person who unreasonably and seriously interferes with another's interests in not having his affairs known

to others or his likeness exhibited to the public is liable to the other.

"The modern doctrine of the right of privacy is a development of the common law to fill a need for the protection of the interests which a person has in living without unwarranted publicity. The doctrine is supported by the great weight of authority in this country and we are satisfied that it is sound. Hence, we hold an action for interference with such right may be maintained in this jurisdiction."

Again on Page 765, it was stated:

"77 C. J. S. right of privacy, Section 2, Page 399, states in bold face: '. . . the dissemination of news or news events does not generally constitute an invasion of the right (of privacy)' ".

It was stated further at Page 766, wherein the Iowa Supreme Court quoted with approval from *Waters v. Fleetwood* (1956), 212 Ga. 161, 91 S. E. 2d 344, 345 as follows:

"The extracts from the above cases illustrate the tendency of the Courts of other jurisdictions to hold that where an incident is a matter of public interest or the subject matter of a *public investigation* (emphasis applied), a publication in connection therewith can be a violation of no one's legal right of privacy. We concur in this view. There are many instances of grief and human suffering which the law cannot redress. The present case is one of those instances. Through no fault of the Petitioner or her deceased child, they became the objects of wide-spread public interest. . . . The dissemination of information pertaining thereto would not amount to a violation of the Petitioner's right of privacy."

In *Bremmer,* supra, the Supreme Court of Iowa proceeded to analyze and consider a number of other decisions wherein the subject matter of such other decisions and the questions involved had to do with whether or not the manner of depiction of the published matter and the circumstances surrounding same along with the delicateness of the subject was of such nature that even though "newsworthy", the privilege should not be granted or available to the publishing defendant. Some of these decisions also dealt with whether or not a Summary Judgment (as in our case) should be sustained and affirmed. At Page 767 of *Bremmer,* the Iowa Supreme Court quoted from *Jacova v. Southern Radio and Television Company,* Florida (1955), 83 S. E. 2d 34, 36, 40, a case involving a film of gambling raids in which one of the Plaintiffs was apparently a bystander, as follows: "A Summary Judgment was affirmed upon appeal on the ground the publication was in connection with the dissemination of legitimate news items. The decision quotes with approval:

" 'The public has an interest in the free dissemination of news. This interest was well stated by that great American Thomas Jefferson in the following words: 'The only security of all is in a free press. The force of public opinion cannot be resisted when permitted freely to be expressed. The agitation it produces must be submitted to. It is necessary to keep the waters pure. No government ought to be without sensors, and where the press is free, no one ever will.'

"'. . . it is vital that no unreasonable restraints be placed upon the working news reporter or the editorial writer.'"

Further in *Bremmer,* and on Page 767, the Supreme Court quoted from *Jones v. Herald Post Company,* 230 Kentucky 227, 18 S. W. 2d 972, 973, wherein the Plaintiff's picture was published with a story of her conduct in resisting and attacking her husband's assasins and wherein a demurrer to her Petition was sustained as follows: ". . . she was an innocent actor in a great tragedy in which the public had a deep concern."

The quote from *Jones,* supra, could well apply to the Plaintiff herein as she too appears to be an innocent actor in a great tragedy in which the public has a deep concern.

The privilege concerning "newsworthy" items is not complete and unfettered. At 767 of *Bremmer,* supra, the Iowa Supreme Court quoted from *Sidis v. F-R Publishing Corporation,* 2 Cir. (1940), 113 Fed. 2d 806, 809, 138 A. L. R. 15, as follows:

"We express no comment on whether or not the newsworthiness of the matters printed will *always* constitute a complete defense. Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency. . . ." (Emphasis applied.)

In other words, this Court understands that it has two requirements before it can concur in Defendants' position that it had a privilege to print the questionable material under the particular ground now being consid-

ered. These two requirements are first, that the material be "newsworthy"; and secondly, that it not be of such intimate nature as to outrage the community's notions of decency. "Shockingly offensive" has been a standard used to further define this particular requirement. As was stated in *Virgil v. Time, Inc.,* 527 Fed. 2d 1122 (9th Cir. 1975), at Page 1129: "The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled and becomes a morbid and sensational prying into private lives *for its own sake* with which a reasonable member of the public with decent standards would say that he had no concern." (Emphasis applied.)

In the same vein, the description and definition of the type of revelation that would not afford a publisher the exemption was indicated in *Virgil v. Sports Illustrated,* 424 Fed. Supp. 1286 (S. E. Cal. 1976), at 1289 as follows:

"For highly offensive facts, i.e. those having a degree of offensiveness equivalent to 'morbid and sensational', to be denied protection as newsworthy, the revelation of them must be *'for its own sake'".* (Emphasis applied.)

We turn first to the question as to whether or not the article as it related to the Plaintiff herein was newsworthy or of proper public interest. In *Bremmer, supra,* the Iowa Supreme Court quoted from *Barber v. Time, Inc.,* 345 Missouri, 1199, 159 S. W. 2d 291, 295, as follows: "The determination of what is a matter of public concern is similar in principle to qualified privilege in libel. *It is for the Court to say first whether the occa-*

sion or incident is one of proper public interest." (Emphasis applied.)

The U. S. Supreme Court held that involuntary sterilization is a sensitive area of human rights (See *Skinner v. Oklahoma,* 316 U. S. 535, 536, 82 Lawyers Edition, 1655, a 1942 decision; See also *Compulsory Sterilization: Weeding Mendel's Garden,* 22 Drake Law Review 355, a 1973 publication).

Aside from any authorities cited, in the final analysis it is the Court's duty and responsibility to examine the content of the article along with the materials supplied by counsel which are indicative or supportive of the question of newsworthiness, and for the Court then to make a reasoned decision as to this particular element or requirement. After giving due consideration to all of the aforementioned, and in particular the article itself, the way it was written, the subject matter, and after giving due consideration to the necessity and/or propriety of singling out and naming this Plaintiff, this Court comes to the conclusion and finds that this article was newsworthy and this requirement as relates to the sought privilege has been satisfactorily established.

Turning next to the additional requirement that appears to have been carved out by case decisions, i.e. that the subject matter involved and/or the way that it is presented, be other than "shockingly offensive" and not be such as to outrage the community's notions of decency, this Court again has given due consideration to the article itself with specific notation of how the particular subject of sterilization of this Plaintiff was treated in said article, as indicated above, the location of such comments in the article itself, with specific notation that no comment concerning sterilization was contained either in the headline or successive headline, and such being the case and after such due consideration, this Court comes to the conclusion and finds that the nature of this article and the comments made concerning this Plaintiff are not of such a delicate nature and are not delivered in such an untasteful manner as to deny the Defendants the privilege claimed herein. The fact of sterilization itself is not a subject matter that would particularly outrage the community's notions of decency. That is not to say that the public should not be properly outraged at how and why this medical procedure was accomplished. In reviewing the article, the Court is of the opinion that the average reader (assuming one would read the whole article) would be left with a distinct impression that this Plaintiff is a woman to be pitied and was, in fact, the victim of an outrageous intrusion on her person. She does not come off as being a bad person, or one that should be held in ill repute in the community.

The Court having previously determined, therefore, that the article was, in fact, newsworthy and was not shockingly offensive or distasteful and was not a sensational prying into Plaintiff's private life for its own sake, determines and rules that the Defendants and each of them have satisfactorily proved as a matter of law their defense to the present cause of action filed against them by the Plaintiff. This is based on uncontroverted facts and the Court's decision is based on its understanding and application of applicable law. Such being the case, the Motion for Summary Judgment as filed herein by Defendants, Des Moines Register & Tribune

Company and by Margaret Engle, as against the Plaintiff, Robbin Howard, are in each instance sustained and Summary Judgment in favor of said Defendants is hereby entered against the Plaintiff, Robbin Howard.

Dated at Des Moines, Iowa, this 10th day of May, 1978.

/s/ Anthony M. Critelli

Judge of the Fifth Judicial
District of Iowa.

Clerk to forward copy of this entry to:

Glenn Smith—Des Moines.

Oscar Jones—Des Moines.

Roger Wilke—Des Moines.

APPENDIX C

IN THE SUPREME COURT OF IOWA

(Filed September 19, 1979)

120

62059

ROBBIN HOWARD,

Appellant,

vs.

DES MOINES REGISTER AND TRIBUNE COMPANY, DR. ROY C. SLOAN and MARGARET ENGEL,

Appellees.

Appeal from Polk District Court—A. M. Critelli, Judge.

Appeal by plaintiff from summary judgment for defendant newspaper and reporter in invasion of privacy action. AFFIRMED.

Oscar E. Jones, Des Moines, for appellant.

Paul E. Kritzer and Glen L. Smith, Des Moines, for appellees Des Moines Register and Tribune Company and Margaret Engel.

Considered en banc.

McCORMICK, J.

The trial court entered summary judgment for defendant Des Moines Register and Tribune Company and

its reporter Margaret Engel in this action for invasion of privacy. The action was brought by plaintiff Robbin Howard in an effort to obtain redress from these defendants and defendant Dr. Roy C. Sloan for a disclosure in a 1976 newspaper story that she had been involuntarily sterilized while a resident of the Jasper County Home in 1971. This appeal does not involve the claim against Dr. Sloan. The controlling questions are whether recovery from the newspaper and its reporter is precluded either because the information was already public or because the trier of fact would be unable to find it was not newsworthy. We affirm the trial court.

In *Bremmer v. Journal-Tribune Publishing Co.*, 247 Iowa 817, 76 N. W. 2d 762 (1956), this court held that a common-law action for invasion of privacy may be maintained in Iowa. We have adopted the principles of the tort delineated in *Restatement (Second) of Torts* § 652 (1977). *See Winegard v. Larsen,* 260 N. W. 2d 816, 822 (Iowa 1977).

Plaintiff based this action on the theory that defendants invaded her privacy by giving unreasonable publicity to her private life. This theory of invasion of privacy is defined in *Restatement* section 652D:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public.

In moving for summary judgment, defendants relied on several grounds. The trial court rejected public record

and waiver of privacy grounds but sustained the motion on the newsworthiness ground. As they are entitled to do, defendants seek affirmance on grounds rejected by the trial court as well as on the ground which was accepted. *See State ex rel. Miller v. National Farmers Organization,* 287 N. W. 2d 905, 906 (Iowa 1979); *In re Estate of Poulos,* 229 N. W. 2d 721, 724-25 (Iowa 1975). In deciding the appeal, we find it necessary to consider only the public record and newsworthiness grounds.

We first summarize the summary judgment record, which includes pleadings, depositions and affidavits.

In her petition, plaintiff alleged she was formerly known as Robin Woody; in 1970, while a minor, she was confined in the Jasper County Home; she was at that time sterilized against her wishes; after her release from the home she led a quiet and respectable life and made friends and acquaintances who were not aware of her surgery; defendant Roy C. Sloan told defendant Margaret Engel about the 1970 sterilization in late 1975 or early 1976; on February 15, 1976, defendant Des Moines Register and Tribune Company published an article in the Des Moines Sunday Register written by Engel which revealed the 1970 sterilization; and this article subjected her to public contempt, ridicule and "inquisitive notice," humiliated her and caused her mental pain and anguish. In separate divisions she asked actual damages of $500,000 and punitive damages of $500,000 from each defendant.

A copy of the newspaper article accompanied the petition. Under a headline which read "Scalding deaths at Jasper Home revealed," and over Margaret Engel's byline, the article was as follows:

NEWTON, IA.—The Jasper County Home, under fire from the state Health Department for poor care and lax administration, has a history marred by deaths from scalding baths, sterilizations of women who are not mentally disabled, and shipments of prescription drugs that apparently were illegal.

The administrator of the home for 22 years, Riva Ripper, quit in the wake of a Jan. 30 notice from the Health Department that the home's custodial and nursing licenses will be revoked. The revocation notices accused the home of a long list of health, safety and management violations.

The home's nursing director, Ruth Broderson, also resigned. Ripper's husband, Clarence, who ran the adjoining county farm, died of a heart attack Feb. 1.

Health officials say the home has had continual problems over the years. In checking county records, The Register has learned that two of the home's residents died as a result of scalding baths.

A grand jury investigation was held in 1969 in the death of Sheryl Anthony, 18, who died that May of thermal burns. No indictments were returned and the grand jury's minutes remain secret.

On Sept. 9, 1974, there was a second death from burns at the home.

Richard Shivers, 63, died 13 days after suffering from second- and third-degree burns on his back. His aunt, Kathryn Gustafson of Newton, says Shivers told her before he died that he was bathing himself and mistakenly turned on the wrong faucet.

Shivers, who was classed as a chronic schizophrenic, probably got "over nervous and slipped in the tub and could not get out," she said, adding she does not believe anyone was negligent.

Dr. John Ferguson, who visits weekly at the home, said Shivers was able to bathe himself and

that he was "momentarily left" by an aide when the accident occurred.

The state Health Department did not know of the deaths until recently, despite a rule requiring nursing homes to submit reports on such accidents. John Wild, director of the department's licensing section, said few reports ever have been filed by the Jasper home.

The Register also learned that an 18-year-old woman sterilized in 1970 was not retarded or mentally disabled, but an "impulsive, hair-triggered young girl," in the words of Dr. Roy C. Sloan, the home's psychiatrist.

He said the decision to sterilize the resident, Robin Woody, was made by her parents and himself. He does not recall whether Woody agreed to the operation, but a woman who was a nurse at the home at the time said "she didn't want it at all."

Forced Sterilization

"For two to three weeks when I came to work she was crying," said Collene Blakely of Newton. "She was told the only way she could be dismissed from the home is if she would agree to be sterilized."

Dr. Sloan denied that, saying, "We don't think in terms of punishment. That child—she was a young girl—was a very explosive, impulsive young girl largely without controls over her aggressive and, at times, irrational behavior."

He said she was sterilized because "she would be a very questionable risk as far as having and rearing a baby. The people who hold on that way are those who move on to child abuse."

Robin's mother, Mrs. Gladys Woody of Newton, said she agreed with the decision then and now. She would not discuss the matter further.

Woody was discharged from the home Dec. 29, 1971, and Mrs. Woody does not know where she is living.

6 Sterilizations

The State Board of Eugenics reports six sterilizations — all of women — were approved from the Jasper home in the last five years.

Officers of the board, who are trying to get it abolished by the Legislature, say they do not enforce a 1936 state law allowing sterilizations for persons believed likely to bear a child having "an inherited tendency to mental retardedness, syphilis (sic) mental illness, epilepsy, criminality, or degeneracy or who would probably become a social menace or ward of the state."

"We never approved a sterilization for anybody who was unruly or a discipline problem," said Theresa Weiser, executive secretary of the board. "They had to be severely mentally retarded."

The board approved 176 sterilizations in the last five years; 39 were denied.

Although it is not required that sterilization cases go before the board, Dr. Sloan said the home began sending its requests there in 1972.

"There was a great deal of concern and local criticism emanating from certain people that perhaps there might not have been a need for sterilizations, that there were some shenanigans going on," he said.

Dr. Sloan said he decides whether to recommend the surgery on the basis of "whether that person is capable of being able to become a parent and be responsible for a child."

Chronically Ill

"One of the very sound reasons (for surgery) is for a chronically and severely ill person whose behavior is such that it impairs their judgment so that

sex and pregnancy would be considered a desirable thing to accomplish," he said.

He said he cannot recall how many residents were sterilized in his eight years at the home, but that all were women and "a number" weren't retarded. He noted that "probably three or four of the individuals did sign a statement" consenting to the operation. The women's guardians always approved the surgery, he said.

Apparent irregularities involving drugs brought the facility to the attention of another state agency. The home, and the drug firms supplying it, apparently were in violation of policies of the Iowa Board of Pharmacy Examiners for years before the home was granted its first pharmacy license in February, 1973.

Before that time, the late George Weirick, Sr., a pharmacist registered at his Colfax drugstore, would travel to the home one afternoon a week, working with the drugs that had been delivered there. Board rules say prescription drugs cannot be sent to an address other than the one at which a pharmacist is licensed.

The only exception is if a doctor registers with the state to be responsible to receive and lock up any drugs. No doctor was so registered at the Jasper home.

Paul Crews, executive secretary of the pharmacy board, said when a complaint about this situation was filed in 1972, the board insisted a license be obtained.

"We could have filed a criminal charge, but they were purchasing it (prescription drugs) out of ignorance," he says. "You do have to be reasonable in these matters."

Weirick's son, George, who is the home's current pharmacist, said this rule was never explained by the examiners and drugs usually were delivered to the nurse in charge, who would lock them up.

Crews said although the home can be excused, the companies shipping the drugs should have known it was illegal. Action was not taken against the firms, Crews said, because they were from outside Iowa and the board has no power over them.

When informed one of the home's major suppliers was the J. W. Edgerly Co. of Ottumwa, Crews said, "Following our established procedures, I know they were admonished."

Knew Nothing

Jay Anderson, president since 1974 of the Ottumwa firm, knew nothing about any admonition or where the drugs were sent. He said no invoices listing addresses were kept, but said it was thought a pharmacist was at the home when the drugs were received.

Drugs also were dispensed haphazardly, a former pharmacist at the home charges. Martin Ogden, 41, said he was asked by the younger Weirick, his former drugstore partner, to work at the home in May, 1973.

Ogden said keys to the nurse's medication room often were left in the open. He said he first became alarmed when he saw any employe who was a former patient attempting to prepare medicine trays while "in a state of intoxication either by alcohol or drugs."

"There was a very definite oversupply of medication and I was frightened for my license when I saw the very slipshod drug procedures there," Ogden said. "A patient, an obviously insane man, reached into his pockets and pulled out two fistfuls of drugs on another occasion."

Charges of overmedication were echoed by former nurse Blakely and activities director Vivian DeGreef, 50. Registered nurse Colleen Haft, who has worked at the home for 14 years, said most of the residents get medicine two or three times daily.

Defends Practices

Dr. Sloan defended the home's drug use. "My judgment has to prevail and I would question what people say who probably don't have a qualified opinion," he said.

Ogden said his problems at the home contributed to the end of his partnership. Ogden's work at the home was terminated by former county supervisor Carroll Eichner after he set a coat-hanger booby trap to discover if anyone entered the pharmacy in his absence.

Ogden asked for a pharmacy examiner's audit when he left Dec. 7, 1973. In the report given to the Board of Supervisors, the pharmacy examiner said no significant quantity of drugs was unaccounted for. The report did insist the pharmacist hold the only key to the drug room, one of Ogden's complaints. Dr. Ferguson said Ripper and the Board of Supervisors then gave up their keys.

A rapid staff turnover adds to the home's problems, said DeGreef, who left her job as activities director Jan. 5. She estimated 30 to 35 employes have left the home in the last six months. Supervisor Wayne Taylor has said an employee was fired recently for being drunk and another for charging personal items to the county.

Other complaints were aired at a public meeting that filled the county courtroom Feb. 7. Although Taylor said he and supervisor Francis Van Zante called the meeting with the intention of immediately closing it to interview an applicant for administrator, public pressure reopened the meeting after 70 minutes.

Several citizens chastised the two men for ignoring the third supervisor, Jeanne Bridenstine. Van Zante admitted he and Taylor had met three times at the home without Bridenstine.

Other complaints raised during the meeting include:

A charge by Charles Gifford of Newton, a former county Democratic chairman, that 39 absentee ballots were filled out in the 1964 election for residents of the home who were incapable of voting, including his brother, Dale. The ballots were thrown away when contested, Gifford said.

A November, 1973, accident in which two residents of the home burned to death when a truck rammed into the home's station wagon as it was traveling slowly on the interstate.

Police said Clarence Ripper had taken three residents and an employe to round up cattle owned by Jack Wormley, a former state senator, that had strayed onto Interstate 80.

The home's car was struck from the rear, exploding its gas tank. The third resident was burned severely, had fingers amputated and spent seven months in University Hospitals at Iowa City recovering.

Taylor defends the home as one of the best in Iowa and credits it with serving people other homes reject. In recent months the facility has temporarily housed 2-, 3- and 5-year olds waiting for transfer to foster homes, a 42-year old woman serving a jail sentence there and many teen-aged runaways.

Some 76 of the home's 144 residents are mental patients. Wild, of the health department, said these residents should be moved to the Mount Pleasant mental institution, where they could be better served.

A hearing on whether to revoke the home's state custodial and nursing home licenses will be held before Mar. 27. The Jasper County attorney has appealed the state department's action and is awaiting specific charges behind the list of violations alleged in the Jan. 30 revocation notice.

In their answer, the newspaper and Engel admitted publication of the article but denied the material invasion of privacy allegations. They also asserted affirmative defenses on constitutional, newsworthiness, public record and waiver grounds.

They repeated these allegations in moving for summary judgment. Affidavits and depositions of several persons were offered in support of the motion.

In resisting the motion, plaintiff denied the relevancy and sufficiency of the proof in support of the motion and offered her affidavit in which she denied the basis of defendants' waiver defense. She also alleged she lived in Des Moines at the time of defendants' investigation, at an address known by her parents, but was not contacted prior to publication of the article.

Defendants' depositions and affidavits showed that plaintiff was actually sterilized in 1971 rather than 1970 as reported in the article. She was then an eighteen-year-old resident in the Jasper County Home. The incident was not a matter of public knowledge at the time it occurred.

The summary judgment record showed other relevant circumstances.

Myrle J. Corso was employed as a nurse's aide at the Jasper County Home from September 1, 1971, to November 1, 1971, when she voluntarily left her employment. She complained about conditions in the home to Opal M. Snyder of Newton, who wrote a column for a local daily newspaper and published a bimonthly newsletter. At Snyder's request, Corso prepared a written statement detailing ten specific situations which she had

observed. They included several incidents of patient abuse and neglect and of mishandling of drugs. They also included instances of involuntary sterilization. Two women other than plaintiff were identified as having been sterilized against their will.

Upon Snyder's recommendation, Corso mailed copies of her statement to Governor Robert D. Ray, the State Department of Health, defendant newspaper, and several other persons and groups.

Subsequently, Snyder searched the county warrant register and claim record in the county auditor's office and found that the county had paid for surgery for the two women named by Corso. She also found that the county had paid for surgery for plaintiff, surgery which she suspected was also a sterilization. She confirmed this through a telephone call to the hospital bookkeeper. Snyder protested the sterilizations through a series of letters and telephone calls to the hospital, various doctors and the State Board of Eugenics. The hospital notified Snyder it would not perform additional sterilizations of residents in the home without approval of the eugenics board.

The State Department of Health investigated the home on the basis of the Corso statement. Defendant newspaper published an account of that investigation in January 1972 but did not mention the allegations about sterilizations. The state's investigative report was not made public. In June 1975 the health department issued a report listing numerous deficiencies in the operation of the home.

Snyder had remained concerned about the conditions in the home and was particularly disturbed that the

home administrator had dismissed a pharmacist who was attempting to implement proper procedures for handling drugs. She was convinced that despite state action taken pursuant to the Corso complaint no improvement in the operation of the home had occurred since 1972.

She decided to express these concerns to Governor Ray personally and in writing. In July 1975 she wrote a letter to the Governor with which she enclosed a statement by Collene Blakely, a former nurse's aide at the home. The Blakely statement was as follows:

> I worked at the Jasper County Home from January to August, 1971. One of the many problems I witnessed during that time concerned an 18 or 19 year old patient, Robin Woody.
>
> One day, when I came to work I found Robin on her bed, crying. When I inquired as to the problem she told me that she had been called to Riva Ripper's office and was told by Mrs. Ripper that she, Robin, would be released if she agreed to be sterilized. Mrs. Ripper is the stewardess at the County Home. If she didn't agree she would have to remain at the Jasper County Home indefinitely.
>
> When I left employment at the County Home, Robin Woody was preparing to enter the hospital the next week. I do not remember the reason that was given by Mrs. Ripper, but Robin told me it was really for the sterilization.
>
> About a year later I saw her at a park in Newton. She told me at that time that she had been released because she "gave up her rights to be a person".

Snyder met with Governor Ray and his press secretary, Richard Gilbert. She discussed the situation and left data with them, including the Corso statement. In a fol-

low-up letter to the Governor, she included a lengthy written statement reciting the history of the problems in the home and her concerns about them. Her statement included a detailed discussion of the sterilizations and referred to the "Woody girl" as one of the victims. No request for confidentiality was made.

The Governor's offffice started a file in which copies of the documents furnished by Snyder were placed. The originals were subsequently returned to Snyder. Copies were sent by the Governor to the Commissioner of Health with a request for investigation of the allegations.

In January 1976 the state health department revoked the nursing and custodial licenses of the home because of its alleged failure to correct the deficiencies listed in its report of June 1, 1975. The original list of sixty-seven alleged violations had grown to one hundred twenty. The violations included a charge of physical, mental, and verbal abuse of patients. County supervisors, legislators, physicians, the county attorney, and other persons discussed the charges with the administrator and staff members of the home in a meeting held on January 30, 1976. Engel attended this meeting. The home administrator denied the charges, and a member of the county board of supervisors attributed the allegations to disgruntled former employees. The controversy was reported by the media, including defendant newspaper.

Various other news reports followed, including the story which is involved in this case. On February 3 a story appeared in which a threat against one of the county supervisors was reported. On February 4 a story written by defendant Engel reported a delay in a hearing scheduled by the board of supervisors to discuss revocation of the licenses. A supervisor was quoted as describing the former employees who complained about the home as "rabble-rousers that caused the problem."

The board of supervisors held several emergency meetings to respond to problems at the home. These meetings received extensive media coverage. Community feelings were aroused; rumors and accusations abounded. Considerable controversy existed about the merits of the department of health action.

On February 8 defendant newspaper carried a story written by Engel reporting the resignations of the administrator and head nurse of the home. Then on February 15 the story which is the subject of the present lawsuit appeared. The story commenced on page 1, but most of it, including the portion in which plaintiff's sterilization was discussed, was continued to page 8A.

Prior to writing the February 15 article, Engel spent two weeks investigating the problems at the home. During the course of her investigation she interviewed Opal Snyder, who showed Engel the documents she had given to the Governor, including her statement and that of Collene Blakely, both of which identified plaintiff as a sterilization victim. She also interviewed Blakely, Dr. Sloan, and the administrator of the home, all of whom confirmed the sterilization. She verified the term of plaintiff's residency and date of surgery through the county auditor's records. She discussed this and other matters with thirty-eight persons who had knowledge of relevant events. Although she attempted to locate plaintiff, she could not find her through records or other means. She was unable to

document the sterilizations of the other women as completely as she could plaintiff's.

After the motion for summary judgment was submitted on this record, the trial court sustained the motion on the ground it could not be found that the disclosure of plaintiff's sterilization was not newsworthy. Plaintiff appealed.

Before considering the public record and newsworthiness grounds of defendants' motion, we address defendants' contention that first amendment considerations create a presumption in favor of summary judgment in cases of this kind. Among other authorities they cite our decision in *McCarney v. Des Moines Register and Tribune Co.*, 239 N. W. 2d 152 (Iowa 1976).

Neither *McCarney* nor other cited cases support this contention. *McCarney* involved application of the actual malice standard of *New York Times Co. v. Sullivan,* 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). We there quoted with approval a principle from *Cerrito v. Time,* Inc., 302 F. Supp. 1071, 1075-76 (N. D. Cal. 1969), *aff'd,* 449 F. 2d 306 (9th Cir. 1971), enunciating the duty of courts in such cases to enforce the constitutional *New York Times* standard by granting summary judgment when the record establishes the plaintiff cannot meet his burden under it. 239 N. W. 2d at 157.

This principle is intended to emphasize a duty of close scrutiny of summary judgment motions in cases which may have a chilling effect on first amendment rights. However, it does not change the rules governing summary judgment:

> The *standard* against which the evidence must be examined is that of *New York Times* and its progeny. But the *manner* in which the evidence is to be examined in the light of that standard is the same as in all other cases in which it is claimed that a case should not go to the jury. If the evidence, so considered, measures up to the *New York Times* standard, the case is one for the jury. . . .

Guam Federation of Teachers, Local 1581 v. Ysrael, 492 F. 2d 438, 441 (9th Cir.), *cert. denied,* 419 U. S. 872, 95 S. Ct. 132, 42 L. Ed. 2d 111 (1974) (emphasis in original). This principle has been applied to an action like the present one for invasion of privacy based on giving publicity to private facts. *See Virgil v. Time, Inc.,* 527 F. 2d 1122, 1130-31 (9th Cir. 1975), *cert. denied,* 425 U. S. 998, 96 S. Ct. 2215, 48 L. Ed. 2d 823 (1976). We hold it is applicable here. However, we do not say a presumption exists in favor of summary judgment in cases like this. Instead we do no more than recognize that the first amendment requires special care to assure that the summary judgment rules are enforced when invoked in cases of this kind.

This brings us to the determination of whether the trial court erred in sustaining the motion for summary judgment in this case.

I. The public record ground. The public record defense arises from two limitations upon a cause of action for invasion of privacy under *Restatement of Torts (Second)* § 652D.

One is that the publicity must concern the private, as distinguished from the public, life of the individual. As noted in Comment b to *Restatement* section 652D, "There is no liability when the defendant merely gives further

publicity to information about the plaintiff that is already public." *See* Warren & Brandeis, *The Right to Privacy,* 4 Harv. L. Rev. 193, 214 (1890). We recognized and applied this limitation in *Winegard v. Larsen,* 260 N. W. 2d 816, 823 (Iowa 1977).

The other limitation is that the individual must prove the matter publicized is of a kind that "is not of legitimate concern to the public." Liability for disclosing public information is foreclosed on this basis because matters of public record are, as a matter of law, of legitimate concern to the public. *See Restatement* § 652D, Comment d (1977); *see also Winegard,* 260 N. W. 2d at 823 ("Under this rule defendants could not be held liable for publicizing matters contained in Judge Hendrickson's ruling.").

In commenting on the *Restatement* principles in *Cox Broadcasting Corp. v. Cohn,* 420 U. S. 469, 494-95, 95 S. Ct. 1029, 1046, 43 L. Ed. 2d 328, 349 (1975), the United States Supreme Court said:

> Thus even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record. The conclusion is compelling when viewed in terms of the First and Fourteenth Amendments and in light of the public interest in a vigorous press.

The *Restatement* authors assert that the *Cox* holding precludes an action for invasion of privacy when the subject matter of the publicity is information which is available from public records. *See Restatement* § 652D, Special Note on Relation of § 652D to the First Amendment to the Constitution ("The case of Cox Broadcasting Co. v. Cohn (1975), 420 U. S. 469, holds that under the First Amendment there can be no recovery for disclosure of and publicity to facts that are a matter of public record."). In *Landmark Communications, Inc. v. Virginia,* 435 U. S. 829, 840, 98 S. Ct. 1535, 1542, 56 L. Ed. 2d 1, 11 (1978), the Supreme Court confirmed the accuracy of the *Restatement* view when it characterized the *Cox* case by saying, "Our holding there was that a civil action against a television station for breach of privacy could not be maintained consistently with the First Amendment when the station had broadcast only information which was already in the public domain."

Therefore, under *Cox,* the *Restatement* principles which preclude an invasion of privacy action for accurate disclosure of information contained in public records are mandated by the first amendment to the Federal Constitution.

The issue here is whether the fact of plaintiff's 1971 sterilization was a matter of public record at the time of the newspaper disclosure.

An affidavit of Richard Gilbert states that the documents furnished to Governor Ray by Opal Snyder in July 1975 were placed in the working files of the Governor's office. After being copied, the originals were returned to Mrs. Snyder. In November 1976, after he had left the Governor's employ and had entered employment with the defendant newspaper, Gilbert asked the Governor's administrative assistant for the file on the Jasper County Home, and it was willingly produced for his examination. It contained copies of the documents furnished by Snyder which identified plaintiff as a 1971 sterilization victim.

The Jasper County auditor's records showed a claim and warrant for plaintiff's surgery, although they did not reveal its nature.

Whether these records were public depends upon application of the provisions of Code chapter 68A, Iowa's Freedom of Information Act. The history of this legislation is discussed in Note, *Iowa's Freedom of Information Act: Everything You've Always Wanted to Know About Public Records But Were Afraid to Ask,* 57 Iowa L. Rev. 1163 (1972). As originally proposed, the Act purported to designate all documents in the legal possession of a public official as public records. Specific exemptions contained in section 68A.7 were added by floor amendment. *Id.* at 1177-78.

Section 68A.1 defines "public records" as "all records and documents of or belonging to this state or any county . . . , or any branch, department, board, bureau, commission, council, or committee of any of the foregoing." The statute provides a broader definition of public records than existed at common law. *Compare Des Moines Register and Tribune Co. v. Osmundson,* 248 N. W. 2d 493, 501 (Iowa 1976), *with Linder v. Eckal,* 261 Iowa 216, 220, 152 N. W. 2d 833, 836 (1967). Moreover, section 68A.2 gives citizens the right to copy and the media the right to publish these public records unless a statutory exemption or provision, such as section 68A.7, specifies otherwise or unless an injunction against disclosure is entered pursuant to section 68A.8. *Osmundson,* 248 N. W. 2d at 502; *see* Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process,*

60 Iowa L. Rev. 731, 778 (1975) (suggesting Act should be construed broadly).

To facilitate public scrutiny of the conduct of public officers, the statute generally permits public access to writings held by them in their official capacities, regardless of origin. *See MacEwan v. Holm,* 226 Ore. 27, 359 P. 2d 413 (1961); 66 Am. Jur. 2d *Records and Recording Laws* § 19, at 354 (1973).

We believe the Act is accurately characterized in Note, *Iowa's Freedom of Information Act, supra* at 1166, as follows:

> The intent of chapter 68A, and thus the manner of its construction, are manifest in organizational concepts underlying the statutory format. The first of the chapter's four identifiable thrusts establishes the statutory definition of "public records," and is meant to be the *sine qua non* of the process of decision leading to access to public records. Following this definition of public records, the statute delineates a broad grant of inspection rights applicable to all public documents, subject only to express limitations found elsewhere in the Code. The third step in the statutory scheme establishes a list of express and specific limitations on the right of access. The final organizational construct permits concealment of public records under circumstances where public access would cause substantial and irreparable harm to any individual and no public interest would be served. By this format, the statute would appear to establish a liberal policy of access from which departures are to be made only under discrete circumstances.

We limit our application of the statute in this case to the documents involved here. We have no occasion to determine whether the reach of the statute may be affected

by constitutional provisions in other situations. *Cf. Sadler v. Oregon State Bar,* 275 Ore. 279, 550 P. 2d 1218 (1976) (holding statute which allowed public inspection of bar association records of complaints about attorney conduct did not substantially impair the inherent power of the judicial branch to regulate the bar).

The auditor's records were required to be kept by statute, *see* § 230.26, The Code 1966, and would have been deemed public records even before chapter 68A was enacted. *Linder v. Eckard,* 261 Iowa at 220, 152 N. W. 2d at 836. They are well within the definition of public records in chapter 68A. *See Osmundson,* 248 N. W. 2d at 501.

The Snyder and Blakely documents which were filed in the Governor's office also clearly come within the definition of public records in section 68A.1. Upon his acceptance of custody, the documents were in the lawful possession of his office and hence became documents "of or belonging to" the state. Furthermore, the documents are not exempted from disclosure by a specific statutory provision as section 68A.2 requires. No injunction was secured under section 68A.8, and no exemption under a section outside chapter 68A appears available. Section 68A.7(2), which exempts "hospital records" and "medical records" of a "patient or former patient, including outpatient," does not apply because the documents here were neither compiled for diagnostic or treatment purposes by hospital or medical personnel nor maintained as records of a hospital or physician. They are not hospital or medical records within the meaning of the statute. *See* Attorney General's Opinion 75-7-2, *reprinted in* [1975-76]

Iowa Att'y Gen. Biennial Rep. 160-62 (holding that auditor's records relating to alcoholic treatment are not within the exemption).

We think this case comes within the limitations on the tort imposed in *Restatement* § 652D and applied in *Winegard.* Because the documents were public, the information which they contained was in the public domain. *Osmundson,* 248 N. W. 2d at 503.

The fact of plaintiff's sterilization was thus a public as opposed to a private fact and a matter of legitimate public concern. Therefore the disclosure is not actionable. *See Winegard,* 260 N. W. 2d at 823; *Metter v. Los Angeles Examiner,* 35 Cal. App. 2d 304, 95 P. 2d 491 (1939); *Meetze v. Associated Press,* 230 S. C. 330, 95 S. E. 2d 606 (1956).

This ground is sufficient to support the summary judgment.

II. The newsworthiness ground. The second ground which we consider is defendants' contention that the trier of fact would be precluded from finding that the disclosure was not of legitimate concern to the public because not newsworthy. Under the elements of the tort defined in *Restatement* section 652D, it is necessary for the plaintiff to prove the lack of newsworthiness of the disclosure as well as its invasiveness. Newsworthiness is thus not an issue of privilege which must be urged defensively but an element which must be negated by the plaintiff in meeting her burden of proof.

We recognized in *Bremmer v. Journal-Tribune Publishing Co.,* 247 Iowa 817, 76 N. W. 2d 762 (1956), that

the dissemination of news does not constitute an actionable invasion of privacy.

The right of the press to publish news is assured by the first amendment guarantees of free speech and free press. The constitutionality of an invasion of privacy action predicated on the publication of truthful information has not yet been determined by the United States Supreme Court. *See Cox Broadcasting Corp. v. Cohn,* 420 U. S. 469, 491, 95 S. Ct. 1029, 1044, 43 L. Ed. 2d 328, 347 (1975). However, the Court has noted that, "[b]ecause the gravamen of the claimed injury is the publication of information, whether true or not, the dissemination of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press." *Id.* at 489, 95 S. Ct. at 1043, 43 L. Ed. 2d at 346. Even though the Supreme Court has not decided the related question whether the first and fourteenth amendments require truth to be recognized as a defense in defamation actions brought by a person who is not a public officer or public figure, the seriousness of the issue is emphasized by the Court's holding that liability cannot be imposed in such actions without proof of fault. *See Gertz v. Welch,* 418 U. S. 323, 347, 94 S. Ct. 2997, 3010, 41 L. Ed. 2d 789, 809 (1974).

The right of privacy is a fundamental social value which is also constitutionally protected. *Roe v. Wade,* 410 U. S. 113, 152, 93 S. Ct. 705, 726, 35 L. Ed. 2d 147, 176 (1973) ("the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones or privacy, does exist under the Constitution"). We recognize a public interest in preventing wrongful intrusions into

privacy. *See Rosenblatt v. Baer,* 383 U. S. 75, 92, 86 S. Ct. 669, 679, 15 L. Ed. 2d 597, 609 (1966) (Stewart, J., concurring) ("The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.")

The common-law tort based upon giving publicity to the private life of another balances these constitutional interests. Redress is permitted for such publicity when the matter publicized is of a kind that "would be highly offensive to a reasonable person," but only when it also "is not of legitimate concern to the public." *Restatement* § 652D. Under this theory, invasion of privacy for a truthful disclosure is actionable only if the publicity is not newsworthy.

Publicity need not be informative, entertaining, timely or important to be entitled to first amendment protection. *Time Inc. v. Hill,* 385 U. S. 374, 388, 87 S. Ct. 534, 542, 17 L. Ed. 2d 456, 467 (1967). At the very least news includes discussion of "all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama,* 210 U. S. 88, 102, 60 S. Ct. 736, 744, 84 L. Ed. 1093, 1102 (1940).

Because we have adopted the *Restatement* definition of the invasion of privacy tort, it is reasonable to refer to the *Restatement* explanation of its elements. "News" is discussed in Comment g to section 652D as follows:

> Included within the scope of legitimate public concern are matters of the kind customarily regarded as "news." To a considerable extent, in accordance with the mores of the community, the publishers and broadcasters have themselves defined the term, as a glance at any morning paper will confirm. Authorized publicity includes publications concerning homicide and other crimes, arrests, police raids, suicides, marriages and divorces, accidents, fires, catastrophes of nature, a death from the use of narcotics, a rare disease, the birth of a child to a twelve-year-old girl, the reappearance of one supposed to have been murdered years ago, a report to the police concerning the escape of a wild animal and many other similar matters of genuine, even if more or less deplorable, popular appeal.

Insofar as relevant, "private facts" are explained in Comment h as follows:

> Permissible publicity to information concerning either voluntary or involuntary public figures is not limited to the particular events that arouse the interest of the public. That interest, once aroused by the event, may legitimately extend, to some reasonable degree, to further information concerning the individual and to facts about him, which are not public and which, in the case of one who had not become a public figure, would be regarded as an invasion of his purely private life. Thus the life history of one accused of murder, together with such heretofore private facts as may throw some light upon what kind of person he is, his possible guilt or innocence, or his reasons for committing the crime, are a matter of legitimate public interest. . . . On the same basis the home life and daily habits of a motion picture actress may be of legitimate and reasonable interest to the public that sees her on the screen.
>
> The extent of the authority to make public private facts is not, however, unlimited. There may be some

> intimate details of her life, such as sexual relations, which even the actress is entitled to keep to herself. In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern. The limitations, in other words, are those of common decency, having due regard to the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will be done to him by the exposure. Some reasonable proportion is also to be maintained between the event or activity that makes the individual a public figure and the private facts to which publicity is given. Revelations that may properly be made concerning a murderer or the President of the United States would not be privileged if they were to be made concerning one who is merely injured in an automobile accident.

Passage of time is a relevant factor, with other facts, in determining whether the publicity involves a matter of legitimate public concern. *Restatement* § 652D, Comment k.

The *Restatement* comments reveal an analogy between the standard applicable on the issue of newsworthiness and the standard used in obscenity cases. Each standard is carefully circumscribed by constitutional restrictions, each is accompanied by examples, and each contemplates a decision based upon community mores. "The line is to be drawn when the publicity ceases to

be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the community, with decent standards, would say he had no concern." *Restatement* § 652D, Comment h; *see Virgil v. Time, Inc.*, 527 F. 2d at 1129. *See also* Woito and McNulty, *The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?*, 64 Iowa L. Rev. 185 (1979).

We must decide under the present record whether a reasonable person applying the community standard could find the disclosure of which plaintiff complains was a morbid and sensational prying into her life for its own sake.

The article is an example of investigative journalism. Its obvious purpose was to bring the problems of the Jasper County Home to public attention. In chronicling alleged abuses in the home, defendants portrayed a pattern of incidents which cumulatively established more reason for public concern about management of the home than would any one incident viewed in isolation. This journalistic technique is basic and legitimate.

Cases holding disclosure of past events to be actionable are distinguishable. In *Briscoe v. Reader's Digest Ass'n*, 4 Cal. 3d 529, 483 P. 2d 34 (1971), the rehabilitated plaintiff's eleven-year-old conviction of truck highjacking had no discernible relationship to an expose' of current highjacking. Similarly, the disclosure in *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931), of the rehabilitated plaintiff's identity as a prostitute who had been tried for murder eight years before was unrelated to any cur-

rent public issue. Furthermore, the subsequent *Cox Broadcasting Corp.* holding would affect *Briscoe* and *Melvin* if they were decided today because each involved past matters of public record.

In determining whether an item is newsworthy, courts cannot impose their own views about what should interest the community. Courts do not have license to sit as censors. As stated by the court in *Sidis v. F-R Publishing Corp.*, 113 F. 2d 806, 809 (2d Cir.) *cert. denied*, 311 U. S. 711, 61 S. Ct. 393, 85 L. Ed. 462 (1940):

> Regrettably or not, the misfortune and frailties of neighbors and "public figures" are subjects of considerable interest and discussion to the rest of the population. And when such are the mores of the community, it would be unwise for a court to bar their expression in the newspapers, books, and magazines of the day.

In addition to being unwise, it would infringe the first amendment for courts to allow recovery to persons offended by publication of matters of legitimate public concern. See *Landmark Communications, Inc. v. Virginia*, 435 U. S. 829, 98 S. Ct. 1535, 56 L. Ed 2d 1 (1978).

Plaintiff concedes the article in this case was newsworthy, but she asserts the disclosure of her identity was not. We do not believe the disclosure of her identity can be taken out of the context.

In determining whether the disclosure had news value, it is helpful to consider

> the relationship between the invasive disclosure and the newsworthy subject(s) of the article; the contribution of the disclosed facts to the subject matter of the article—whether it adds credibility, contributes further information not otherwise communicable, con-

> tributes to reader perception and understanding, or augments readership by drawing attention to the story; and the constitutional value of the contribution of the disclosure, including its necessity in achieving its purposes.

Bezanson, *Public Disclosures as News: Injunctive Relief and Newsworthiness in Privacy Actions Involving the Press,* 64 Iowa L. Rev. 1061, 1098 (1979). This analysis requires an inquiry into the relevance, impact and value of the disclosure. *Id.* at 1099.

Here the disclosure of plaintiff's involuntary sterilization was closely related to the subject matter of the news story. It documented the article's theme of maladministration and patient abuses at the Jasper County Home. The home had been under the same administration for twenty-two years. Public controversy concerning alleged deficiencies in administration had existed for seven years. The incidents of involuntary sterilization were central to this ongoing dispute. Plaintiff's experience in 1971 was plainly relevant with other past events in evaluating the home's administration.

In the sense of serving an appropriate news function, the disclosure contributed constructively to the impact of the article. It offered a personalized frame of reference to which the reader could relate, fostering perception and understanding. Moreover, it lent specificity and credibility to the report.

In this way the disclosure served as an effective means of accomplishing the intended news function. It had positive communicative value in attracting the reader's attention to the article's subject matter and in supporting expression of the underlying theme.

Examined in the light of the first amendment, we do not believe the disclosure could reasonably be held to be devoid of news value. *See* Bebanson, *supra* at 1099-104.

Assuming, as plaintiff agrees, the newspaper had a right to print an article which documented extrastatutory involuntary sterilizations at the Jasper County Home, the editors also had a right to buttress the force of their evidence by naming names. We do not say it was necessary for them to do so, but we are certain they had a right to treat the identity of victims of involuntary sterilizations as matters of legitimate public concern. The subject is one of grave public interest. *See, e. g., Stump v. Sparkman,* 435 U. S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978). Moreover, at a time when it was important to separate fact from rumor, the specificity of the report would strengthen the accuracy of the public perception of the merits of the controversy.

This is a far cry from embarrassing people by exposing their medical conditions or treatment when identity can add nothing to the probity of the account. *Cf. Banks v. King Features Syndicate, Inc.,* 30 F. Supp. 352 (S. D. N. Y. 1930) (newspaper publication of X ray of identified plaintiff's pelvis showing a hemostat left in her abdomen by a surgeon several years earlier); *Barber v. Time, Inc.,* 348 Mo. 1199, 159 S. W. 2d 291 (1942) (periodical publication of story and photograph identifying plaintiff who lost weight despite constant eating); *Feeney v. Young,* 191 App. Div. 501, 191 N. Y. S. 481 (1920) (film of identified plaintiff undergoing Caesarean section).

The disclosure of plaintiff's identity in this case could not reasonably be viewed as the spreading of gossip solely

for its own sake. *See Johnson v. Evening Star Newspaper Co.,* 344 F. 2d 507, 508 (D. C. Cir. 1965) ("The identifying details were incidental to the story and were not an enlargement which carried the publication beyond legitimate bounds."); *Virgil v. Sports Illustrated,* 424 F. Supp. 1286, 1288 (S. D. Cal. 1976) (decision after remand; test is whether revealing identity goes beyond the giving of information and becomes a morbid and sensational prying into private lives for its own sake.)

In *Jenkins v. Georgia,* 418 U. S. 153, 94 S. Ct. 2750, 41 L. Ed. 2d 642 (1974), the Supreme Court held the Georgia courts erred in submitting the issue of the obscenity of the movie "Carnal Knowledge" to a jury, even though the subject of the movie was sex and it included nudity and scenes purporting to portray sex acts. The Court reasoned:

> Appellant's showing of the film "Carnal Knowledge" is simply not the "public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain" which we said was punishable in *Miller*. . . . We hold that the film could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive way, and that it is therefore not outside the protection of the First and Fourteenth Amendments because it is obscene.

418 U. S. at 161, 94 S. Ct. at 2755, 41 L. Ed. 2d at 650-51. We believe similar reasoning requires a like result in the present case. A reasonable person could not find the disclosure in this case was not of legitimate public concern under the *Restatement* standard applied in the light of the first and fourteenth amendments. Plaintiff therefore cannot prove an essential element of her cause of action.

We hold that the trial court was right in sustaining defendants' motion for summary judgment on this ground.

AFFIRMED.

Reynoldson, C. J., and Allbee, J., concur in division II and the result; Uhlenhopp, J., concurs specially in division II and the result; McGiverin, J., joined by Rees, J., concurs in division I and the result and dissents from division II; Harris, J., concurs in the result in division I and joins Justice McGiverin's dissent to division II; Larson, J., joined by LeGrand, J., dissents.

UHLENHOPP, J. (concurring specially).

I concur in division II of the majority opinion and in the result. I am influenced by a desire not to chill First Amendments rights by a restricted application of newsworthiness.

On the other hand, I would not reach the subject of division I. That division involves the issue of what constitutes a public record *for purposes of the tort of violating a person's privacy.* I would await an appeal which actually necessitates a decision on that subject. Involved *inter alia* is the question whether unsolicited letters written to public officials automatically become public records for purposes of the tort although the letters deal with private affairs which would otherwise be protected by tort law. The privacy of members of the public may hang upon a very slender thread, depending upon our conclusion on this subject.

McGIVERIN, J. (concurring in part and dissenting in part).

I concur in the result and the opinion except as to Division II from which I respectfully dissent.

As to Division II, I agree with the statement of the majority that "[i]n determining whether an item is newsworthy, courts cannot impose their own views about what should interest the community," but from that premise draw a different conclusion.

I believe a genuine issue of fact existed as to whether publication by defendants newspaper and Engel in 1976 of plaintiff's 1970 or 1971 sterilization was then newsworthy. *See* Iowa R. Civ. P. 237.

I believe there are factors in this case which could lead reasonable persons to differ within the bounds of the first and fourteenth amendments in evaluation of legitimate public concern. Passage of time has been recognized as a significant factor in evaluating newsworthiness. *See Briscoe v. Reader's Digest Association,* 4 Cal. 3d 529, 483 P. 2d 34, 93 Cal. Rptr. 866 (1971); *Melvin v. Reid,* 112 Cal. App. 285, 297 P. 91 (1931). Courts, too, have acknowledged that disclosure of identity can be a separate issue in an otherwise newsworthy story. *Briscoe,* 4 Cal. 3d at 537, 483 P. 2d at 39-40, 93 Cal. Rptr. at 871-72 ("We have no doubt that reports of the facts of past crimes are newsworthy. . . . However, identification of the *actor* in reports of long past crimes usually serves little independent public purpose.") (original emphasis).

Accordingly, a jury or trier of fact should be allowed at trial to apply the community standard articulated in the majority opinion and determine whether disclosure of plaintiff's identity was morbid and sensational prying into her life for its own sake. A jury should decide this issue and not a court on summary judgment.

The court should have overruled the motion for summary judgment as to the newsworthiness ground. Therefore, I dissent from Division II.

Rees, J., joins in this special concurrence and dissent, and Harris, J., joins as to the dissent to division II.

LARSON, J. (dissenting)

I join the dissent of Justice McGiverin as to Division II of the plurality opinion. I dissent separately as to Division I.

Under the reasoning of Division I, the information found in the offices of the governor and the Jasper County auditor are "public records" under our freedom of information act and therefore proper subjects of publication. I believe that even if section 68A.2, The Code, would otherwise be available to permit publication of these items of "public" information, they are medical records within the exception to the disclosure act. It is probably true that they are not "medical records" in the traditional sense; and it may be conceded as the plurality contends that they were "neither compiled by a hospital or medical personnel nor maintained as records of a hospital or physician." However, the statute does not impose any such restrictions, and I believe it would be inconsistent with the spirit and context of the act for us to impose them. If the items of information here are "records" under the act as contended by the plurality, it is only necessary to determine whether they are *medical* records for purposes of the exception. They are "medical" records if they pertain to "condition, diagnosis, care or treatment." § 68A.7 (2), The Code. These records here did pertain to medical treatment of the plaintiff. She was sterilized by surgical procedure.

The underpinning of this statutory exception is, I believe, a recognition of the deeply personal and sensitive nature of medical information. This exception should be interpreted to effect this strong policy consideration. Dean Wigmore, while criticizing the analogous doctor-patient privilege, recognized some justification for the privilege in sex-related medical evidence. 8 J. Wigmore, *Evidence in Trials at Common Law* § 2380 (a), at 830 (McNaughton rev. ed. 1961). Justice Blackmun, in advocating a broad scope of the medical file exception to the federal disclosure act, also recognized the strong policy considerations attending dissemination of medical information, saying:

> It is almost inconceivable to me that the Court is willing today to attach the qualification phrase to medical files and thereby open to the public what has been recognized as almost the essence of ultimate privacy. The law's long established physician-patient privilege establishes this. Anyone who has had even minimal contact with the practice of medicine surely cannot agree with this extension by judicial construction. . . .

Department of the Air Force v. Rose, 425 U. S. 352, 387-88, 96 S. Ct. 1592, 1611, 48 L. Ed. 2d 11, 36 (1976) (dissenting opinion).

I believe the publication here could reasonably have been found by a factfinder to improperly invade plaintiff's privacy, and that chapter 68A does not place the underlying information into the public domain so as to emasculate the right to pursue that claim without a trial. I would reverse and remand for trial on the merits.

LeGrand, J., joins in this dissent.

APPENDIX D

FIRST AMENDMENT TO THE U. S. CONSTITUTION: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX E

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No._____

ROBBIN HOWARD,

Petitioner,

vs.

DES MOINES REGISTER & TRIBUNE COMPANY, DR. ROY C. SLOAN and MARGARET ENGEL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF IOWA

CERTIFICATE OF SERVICE

I, Oscar E. Jones, attorney for the petitioner, hereby certify that on the 12th day of December, 1979, three (3) copies of the Petition for Writ of Certiorari were mailed, correct postage prepaid, to:

Paul E. Kritzer
Gary G. Gerlach
Des Moines Register & Tribune Co.
715 Locust Street
Des Moines, Iowa 50304

Glenn L. Smith
Duncan, Jones, Riley & Finley
404 Equitable Building
Des Moines, Iowa 50309

Attorneys for Respondents

I further certify that all other parties required to be served have been served.

Oscar E. Jones
1205 E. 33rd Street
Des Moines, Iowa 50317

Attorney for Petitioner

APPENDIX F

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No._____

ROBBIN HOWARD,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF IOWA

APPEARANCE

COMES NOW Oscar E. Jones, 1205 E. 33rd Street, Des Moines, Iowa 50317, and hereby enters his appearance on behalf of Robbin Howard, Petitioner, in the above cause.

Respectfully submitted,

Oscar E. Jones
1205 E. 33rd Street
Des Moines, Iowa 50317